

S.R. v BMW of N. Am., LLC

2021 NY Slip Op 30928(U)

March 25, 2021

Supreme Court, New York County

Docket Number: 100725/2008

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA M. EDWARDS PART 11

Justice

-----X

INDEX NO. 100725/2008

S. R.,

01/14/2021,

Plaintiff,

MOTION DATE 01/14/2021

- v -

MOTION SEQ. NO. 022/023

BMW OF NORTH AMERICA, LLC, BMW OF NORTH AMERICA, INC., BMW (US) HOLDING CORP., MARTIN MOTOR SALES, INC. and HASSEL MOTORS, INC.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Many were uploaded for motion Sequence 022, but pertained to 023 and vice versa) 635, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728

were read on these motions to/for REARGUMENT/RENEW/RECONSIDERATION

Motion Sequences 022 and 023 are consolidated for disposition. Upon the foregoing documents, Defendants BMW of North America, LLC's and BMW of North America, Inc.'s (collectively, "BMW") motions for leave to reargue, pursuant to CPLR 2221, portions of the court's consolidated Decision and Order, dated December 15, 2020 (New York State Courts Electronic Filing [NYCEF] Doc. No. 630) ("Order"), which decided motion sequences 020 and 021, is denied as BMW failed to sufficiently demonstrate that the court overlooked or misapprehended issues of law or fact. However, as to Motion Sequence 023, which was incorrectly uploaded to NYSCEF by the court as Motion Sequence 022, the court grants the portion of BMW's motion to renew the portion of the consolidated decision only to the extent that the court declined to consider BMW's reply papers on Motion Sequence 021. Upon

incorrectly switched when they were uploaded the documents to NYSCEF. Defendant Martin Motors filed affidavits in support of BMW's motions and Plaintiff opposed them.

Pursuant to CPLR 2221(d)(2), a motion for leave to reargue is left to the sound discretion of the court and may be granted only where the moving party contends that an issue of law or fact had been overlooked or misapprehended by the court when deciding the original motion (CPLR 2221[d][2]). It is not designed to provide the unsuccessful party successive opportunities to reargue issues previously decided by the court or to present new evidence or different arguments than previously raised (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [internal citations and quotation marks omitted]).

Pursuant to CPLR 2221(e)(2), a motion for leave to renew shall be based on new facts not offered in the prior motion that would change the court's prior determination or it shall demonstrate that there has been a change in the law that would change the court's prior determination (CPLR §2221[e][2]).

Here, the court finds that BMW failed to meet its burden and the court denies both motions to reargue. However, the court grants BMW's motion to renew in part to the extent that it considers BMW's reply filed on Motion Sequence 021 (NYSCEF Doc. 635) and upon reconsideration, the court adheres to the court's previous decision to deny BMW's motion in its entirety.

A. BMW's Motion to Reargue Court's Decision (Motion Sequence 020) Regarding Testimony of Michael Leshner, P.E. (Motion Seq. 022, incorrectly uploaded as 023)

In its previous decision regarding Motion Sequence 020, the court denied BMW's Order to Show Cause to strike the *Frye* hearing testimony of Plaintiff's expert mechanical and automotive engineer, Michael Leshner, P.E., in its entirety; permitted Plaintiff to withdraw the

admission of a disputed photograph on page 6 of Exhibit 292; struck all testimony related to the admission of such photograph; and granted BMW the opportunity to cross-examine Mr. Leshner on the affidavits and materials he produced after the conclusion of his testimony. The court declined to consider BMW's and Martin Motors' reply papers because the signed Order to Show Cause did not permit a reply.

During the *Frye* hearing, Mr. Leshner testified in substance that the subject photograph depicted an instrument used in a simulated test that he conducted in 2016, which corroborated Plaintiff's other expert's opinion that at least 2000 parts per million (ppm) of gasoline vapor leaked into the vehicle's engine compartment from the fuel line at a particular rate. Plaintiff alleged in substance that there was no date or time on the photograph and after Mr. Leshner's testimony, when the court asked him to attempt to locate the original digital photograph, Mr. Leshner realized that the photograph was unrelated to his testimony regarding the 2016 test and it had been mistakenly introduced into evidence. Plaintiff sought to withdraw the photograph and Defendants objected and argued that Plaintiff and Mr. Leshner attempted to deceive Defendants and the court.

By written motion filed on January 14, 2021, BMW now moves for leave to reargue the court's decision under Motion Sequence 022, which the court incorrectly uploaded to NYSCEF as Motion Sequence 023. BMW argues in substance that the court overlooked BMW's "critical emphasis" in their reply papers and during oral argument that if the court permitted any portion of Mr. Leshner's testimony to stand, including his ultimate opinion, then it must not permit Plaintiff to withdraw the photograph as it would be unfair and prejudicial to BMW. BMW states that the court inadvertently fashioned a remedy of partial relief that prejudiced BMW and rewarded Plaintiff by erasing their deception and the discrepancies in Mr. Leshner's affidavits

and testimony. BMW further asserts that the court should have granted their request to strike Mr. Leshner's testimony in its entirety or prohibited Plaintiff from withdrawing the photograph so it could be the subject of BMW's cross-examination.

BMW further argues in substance that their cross-examination of Mr. Leshner revealed that Mr. Leshner attempted to deceive the court and Defendants by testifying that the photograph showed his 2016 simulated study using an analyzer with a calibration set on "high scale" instead of "low scale" to indicate that the gasoline vapors measured a maximum of 2,000 ppm, instead of 1,000 ppm. Since the photograph was a blown up, low-resolution version, the words were blurry and it was unclear whether the analyzer was set to high or low calibration. However, a clear photograph of the analyzer revealed that the dial was set on low in the photograph and not high, which contradicted Mr. Leshner's testimony. BMW further argues that after the completion of his testimony in violation of the court's order not to consult with Plaintiff's counsel, Mr. Leshner communicated with Plaintiff's counsel and conducted additional tests to attempt to explain his attempted deception. BMW further argues that the court attempted to fashion a remedy to address the issue, but mistakenly and unintentionally prejudiced BMW, while rewarding Plaintiff by permitting Plaintiff to cover up the attempted deception.

BMW further argues that the court improperly overlooked BMW's reply papers when it unfairly refused to consider them, even though the court considered Plaintiff's reply papers in the Order to Show Cause under Motion Sequence 019.

Plaintiff opposes BMW's motion to reargue and argues in substance that BMW failed to satisfy the requirements of CPLR 2221 by failing to establish that the previous judge overlooked or misapprehended matters of fact or law when she denied BMW's motion to strike Mr. Leshner's *Frye* hearing testimony in its entirety. Plaintiff further argues that the court correctly

permitted Plaintiff to withdraw the photograph because it was mistakenly moved into evidence and was unrelated to Mr. Leshner's testimony. Since Mr. Leshner's testimony was based upon his personal knowledge of the test and numerous other areas, the court correctly struck only the portion of his testimony that pertained to the photograph, while allowing the remainder of his testimony to stand. Plaintiff further states in substance that the court correctly recognized that Defendants' arguments regarding any alleged discrepancies with Mr. Leshner's affidavits and the calibration of the analyzer during his testing relates to his credibility, which is outside the scope of a *Frye* hearing.

Plaintiff further argues that after Mr. Leshner's direct testimony in anticipation of Defendants' impeachment and additional concerns, he conducted two additional tests which yielded the same results as the 2016 test. Mr. Leshner prepared new affidavits and Plaintiff provided Defendants with the affidavits and additional discovery material. Plaintiff argues that in the interest of fairness the court correctly permitted Defendants to cross-examine Mr. Leshner on the additional tests and discovery material provided.

Here, the court determines that it was well within its discretion not to consider BMW's or Martin Motors' replies on the Order to Show Cause. In the underlying Decision, the court indicated that it did not consider BMW's or Martin Motors' reply papers because they were not specifically authorized in the Order to Show Cause. Therefore, it is clear that the court did not improperly overlook it, but explicitly prohibited it by striking the deadline for the reply in the proposed Order to Show Cause. Defendants should not be surprised or prejudiced as the court put them on notice that no replies would be considered when it struck the deadline on the signed Order to Show Cause. The court was well within its discretion to do so. Defendants took a

chance and filed reply papers on their own accord in hopes that the court would consider them, but the court simply refused to do so.

It is of no moment that the court considered Plaintiff's reply on a separate motion. There are now 24 motions, not including cross-motions, filed in this case. The court is not required to keep score, but it has discretion to decide whether it wishes to entertain a reply on an Order to Show Cause on each individual motion submission. Similarly, the court has discretion to determine whether it wishes to hold oral argument on a motion and which arguments, if any, it chooses to consider. As such, BMW failed to demonstrate that the court overlooked or misapprehended any of its arguments in its reply that the court declined to consider, or in its oral argument.

Upon a review of the underlying Order, it is clear the court considered all of BMW's arguments regarding Plaintiff's withdrawal of the photograph and the appropriate remedy to adequately address the situation. The court expressly stated that BMW argued in a letter that they objected to the withdrawal of the photograph without a court order and demanded that Plaintiff produce the original digital photograph. The court discussed BMW's arguments in its motion regarding striking Mr. Leshner's entire testimony because he failed to produce the original image, its objection to permitting Plaintiff to withdraw the photograph unless Plaintiff agreed to strike all testimony related to the photograph, and the need for BMW to have an opportunity to cross-examine Mr. Leshner on the substance of his post-hearing affidavits and discovery material.

However, despite considering all of BMW's arguments, the court disagreed with them as to the appropriate remedy. However, the court sided with BMW and found that Plaintiff did not move to admit the photograph inadvertently, but agreed with Plaintiff on the appropriate relief

necessary to remedy BMW's concerns. Additionally, the court expressly stated that it agreed with Plaintiff that CPLR 3126 applies to penalties for failure to comply with a discovery order, which is inapplicable to the hearing. Striking Mr. Leshner's entire testimony would not be an appropriate remedy because the court did not order Mr. Leshner to produce the photograph, but merely asked him to attempt to locate it. Additionally, the court found that since Mr. Leshner and plaintiff's counsel tried to locate the photograph but were unable to do so, their failure to produce the photograph was not willful, deliberate and contumacious conduct which would be necessary to warrant the striking of Mr. Leshner's entire testimony.

The court also stated that striking Mr. Leshner's entire testimony would be "unduly punitive" because his testimony was much broader than just discussing the subject photograph. The court stated that it agreed with plaintiff that "withdrawing the subject photograph, to which the BMW defendants previously objected, and striking any portion of Leshner's testimony relating to it, is a more appropriate remedy under the circumstances" (Order at p. 8). The court also noted that BMW's challenges to Mr. Leshner's post-hearing affidavits and their apparent discrepancies regarding the calibration of the analyzer pertain to Mr. Leshner's credibility, which are outside the scope of a *Frye* hearing. The *Frye* hearing was conducted to determine whether the expert's deductions are based upon principles that are sufficiently established to have gained general acceptance as reliable. The court considered the prejudice to BMW if it considered the post-hearing affidavits and determined that an appropriate remedy would be for BMW to have an opportunity to cross-examine Mr. Leshner on the new materials.

Therefore, contrary to BMW's arguments, the court adequately considered the consequences of the relief granted in this matter, its potential prejudice to both sides, and determined the appropriate relief under the circumstances. BMW simply disagrees with the

court's decision and failed to demonstrate that the court improperly overlooked or misapprehended any of their arguments.

B. BMW's Motion to Reargue and Renew portions of the Court's Decision (Motion Sequence 021) Regarding Testimony and Materials of Edwin Zucker, P.E. (Motion Seq. 023, incorrectly uploaded as 022)

In its previous consolidated Order regarding Motion Sequence 021, the court denied BMW's Order to Show Cause to strike Plaintiff's expert mechanical engineer, Edwin Zucker, P.E.'s post-affidavit materials and his testimony regarding said materials as beyond the scope of his affidavit filed in 2016, or alternatively to grant leave for BMW to disclose Mark Lawrence, Ph.D., P.E. as an expert witness to rebut Mr. Zucker's testimony, affidavit, and written materials that were beyond the scope of his 2016 affidavit. Plaintiff cross-moved to strike Dr. Lawrence's expert disclosure and preclude him from testifying at the *Frye* hearing or trial. Martin Motors filed affidavits in support of BMW's motion and in opposition to Plaintiff's cross-motion. The court declined to consider BMW's reply and affirmation in opposition to Plaintiff's cross-motion because BMW mistakenly uploaded the incorrect document on NYSCEF, emailed the correct document to the court, but failed to properly file it prior to the date of the Order.

The parties differ significantly as to their analysis of the substance of Mr. Zucker's testimony during the *Frye* hearing, the significance of his post-affidavit material, whether such material was beyond the scope of his original affidavit, and whether there are any substantial inconsistencies.

By written motion filed January 14, 2021, BMW moves for leave to reargue and renew the court's decision under Motion Sequence 023, which was incorrectly uploaded as motion Sequence 022. BMW argues in substance that the court should reconsider and grant BMW's requested relief because the court overlooked or misapprehended certain facts and arguments

raised by BMW, including that Mr. Zucker had no scientific methodology set forth in his post-2016 affidavit disclosures. BMW further alleges that the court mistakenly believed that BMW's arguments regarding Mr. Zucker's changes to the multiplier representing the number of alleged passageways in the vehicle's firewall separating the engine and passenger compartments to achieve a predetermined outcome were an attack on his credibility, instead of an indication that he used no consistent or scientific methodology. BMW further argues that the court overlooked their arguments in their reply which included that Dr. Lawrence is a mechanical engineering expert and his affidavit and testimony would not be cumulative to any of BMW's other experts. Additionally, BMW argues in substance that their other experts cannot adequately rebut Mr. Zucker's post-affidavit material or testimony for various reasons.

BMW further argues in substance that Mr. Zucker changed his methodology to justify a predetermined outcome and that his testimony and new material presented was well beyond the scope of and was inconsistent with the information contained in his May 2016 affidavit. BMW specifically points to inconsistencies in Mr. Zucker's testimony during direct and cross-examination regarding his calculation of the passage of vapors from the engine compartment to the passenger compartment of the vehicle through a composite leak, neither of which was included in his affidavit. BMW argues in substance that on cross-examination, Mr. Zucker realized that he was mistaken about the diameter of the steering shaft and such calculation was central to his testimony and conclusions set forth in his affidavit. Mr. Zucker consulted with Plaintiff's counsel in violation of the court's directives and attempted to address his mistake by implementing new formulas, calculations and methodology which were inconsistent with his previous testimony and were never included in his affidavit. Since Mr. Zucker's 2016 affidavit

failed to set forth his methodology and formulas used, it was impossible to know how he derived his ultimate opinion.

BMW further argues that Mr. Zucker's role changed since he was first disclosed as an expert in 2010. In 2010, he discussed Defendants' alleged negligence regarding the fuel hose, but now, after Plaintiff's other experts have been precluded, Mr. Zucker is Plaintiff's only expert who attempts to quantify the alleged exposure to gasoline vapors inside of the subject vehicle. Therefore, BMW requests leave to disclose Dr. Lawrence as an expert witness to rebut Mr. Zucker's testimony and materials that exceeded his affidavit.

Additionally, BMW argues to renew its motion based on additional facts regarding their efforts to correct the filing of their reply and opposition to Plaintiff's cross-motion and argues that it was unfair for the court to disregard its reply papers. BMW inadvertently uploaded the wrong document to NYSCEF on November 23, 2020, but immediately called the NYSCEF Resource Center and the County Clerk's office to attempt to correct their mistake. BMW served the parties with the correct document and emailed it to the previously assigned judge's chambers based on the instructions provided by one of her law clerks. Unfortunately, despite BMW's repeated efforts to contact the clerk's office, because of the court's limited number of clerks working at the courthouse during the COVID-19 pandemic and the excessive amount of documents filed, the clerk's office did not respond until December 21, 2020, which was after the date the decision was rendered. The clerk's office advised BMW to upload the correct document under a new NYSCEF docket number, which BMW did immediately.

BMW further argues in substance that the court should have sanctioned Plaintiff's counsel, despite BMW not specifically requesting such relief because BMW requested "such

other and further relief as the Court deems just and proper.” Therefore, since the court determined that monetary sanctions were warranted, it should have imposed such sanctions.

Plaintiff opposes the motion and argues in substance that BMW failed to satisfy CPLR 2221 by showing that the court overlooked or misapprehended matters of fact or law on its motion to reargue and that it inappropriately requested additional relief which was not requested in its initial motion, including striking all of Mr. Zucker’s testimony and sanctions against Plaintiff’s counsel. Plaintiff further argues in substance that Mr. Zucker testified for seven days and Defendants extensively cross-examined him regarding his affidavit and the methodologies he utilized to reach his conclusions. Plaintiff also argues that the court considered BMW’s arguments alleging that Mr. Zucker changed the multiplier in his calculations and that he has no methodology. However, the court rejected these arguments and correctly recognized that such arguments pertained to Mr. Zucker’s credibility, which was not the subject of the *Frye* hearing. Plaintiff alleges several examples of BMW’s counsel’s failure to understand certain technical and mathematical concepts brought out during Mr. Zucker’s cross-examination, so BMW incorrectly distorted his testimony and incorrectly alleged that he changed his methodology or had no methodology and used different multipliers.

Additionally, Plaintiff argues that the court did not misapprehend the facts or law regarding its denial of BMW’s alternative request to call Dr. Lawrence as a rebuttal witness. Plaintiff argues in substance that procedurally, BMW cannot have a rebuttal witness because Plaintiff has the burden at a *Frye* hearing to present its case-in-chief first and since Defendants have not yet presented their witnesses, they are really attempting to improperly introduce a new primary witness years after they were required to disclose such witnesses.

Plaintiffs also argue that the court properly disregarded BMW's reply papers within its discretion. The court crossed out the deadline to file a reply in the Order to Show Cause and the portion of it opposing Plaintiff's cross-motion to strike BMW's new 3101(d) expert disclosure was untimely. Also, Plaintiff alleges that the arguments raised in BMW's reply were considered by the court during oral argument and correctly addressed in the court's decision.

BMW's reply contradicts all of Plaintiff's substantive arguments and repeats many of its initial arguments.

Here, the court denies BMW's motion to reargue and finds that it failed to demonstrate that the court overlooked or misapprehended issues of fact or law, however the court grants BMW's motion to renew the portion of the Order where the court declined to consider BMW's reply papers on Motion Sequence 021 as BMW diligently attempted to correct their mistake, but the court did not respond in a timely manner. Upon reconsideration, the court considered the arguments raised in BMW's reply and adheres to its previous decision denying BMW's motion.

In its Order, the court denied BMW's motion in its entirety and found that "[i]n order to more accurately assess the methodologies and conclusions referenced in the May 2016 affidavit, and for reasons previously articulated when discussing Leshner's affidavits, this Court finds no basis for striking Zucker's testimony and rejects BMW defendants' contention that the additional materials . . . should be precluded from the hearing" (Order at p. 14).

The court also rejected BMW's request to call Dr. Lawrence as a rebuttal witness and determined that their extensive cross-examination of Mr. Zucker on the newly discovered materials was sufficient and they have the opportunity to rebut his testimony on their case-in-chief through the testimony of their own experts. However, the court acknowledged that the need

to call additional expert witnesses could change depending upon the remainder of the hearing and the new judge assigned to the case could find that such testimony is appropriate.

As to Mr. Zucker's communication with Plaintiff's counsel while he was under oath about the apparent miscalculation in his original testimony, the court determined such communication to be a blatant disregard of the court's repeated instructions for him not to discuss his testimony with anyone. However, the court specifically noted that although the court believed such conduct was so lacking in professionalism that sanctions were warranted, it declined to do so, since Defendants did not request such relief. Instead, the court warned Plaintiff's counsel to refrain from such conduct in the future.

Therefore, it is clear that the court considered all of BMW's arguments, except the new ones raised in their reply regarding the noncumulative nature of Dr. Lawrence's testimony, but the court disagreed with BMW's arguments. Even when considering BMW's arguments in their reply upon reconsideration, the court is unpersuaded that BMW should be permitted to call an additional rebuttal expert witness and the court adheres to its previous decision denying BMW's new expert disclosure.

The court has the discretion not to sanction Plaintiff's counsel whether or not BMW requested sanctions. After careful consideration the court determined that a warning and reprimand were sufficient in lieu of sanctions.

Therefore, the court finds that BMW failed to set forth a sufficient basis to demonstrate that the court overlooked or misapprehended an issue of law or fact and denies BMW's motion to reargue the court's previous Order. However, the court grants BMW's motion to renew to the extent that it considers the arguments raised in their reply to Motion Sequence 021 and upon reconsideration adheres to its previous decision to deny BMW's motion in its entirety.

Accordingly, it is hereby

ORDERED that under Motion Sequence 022, which was incorrectly uploaded to NYSCEF as Motion Sequence 023, regarding the testimony and material related to Michael Leshner, P.E., Defendants BMW of North America, LLC's and BMW of North America, Inc.'s motion for leave to reargue portions of the court's Decision and Order, dated January 15, 2020, relating to Motion Sequence 020 is denied in its entirety; and it is further

ORDERED that under Motion Sequence 023, which was incorrectly uploaded to NYSCEF as Motion Sequence 022, regarding testimony and material related to Edwin Zucker, P.E. and expert disclosure of Mark Lawrence, Ph.D., P.E., Defendants BMW of North America, LLC's and BMW of North America, Inc.'s motion for leave to reargue and renew portions of the court's Decision and Order, dated January 15, 2020, relating to Motion Sequence 021 is decided as follows:

(1) the court denies the portion of the motion seeking leave to reargue the court's Decision and Order, dated January 15, 2020,

(2) the court grants in part the portion of the motion seeking leave to renew the portion of the court's Decision and Order, dated January 15, 2020, regarding the court's decision to disregard BMW's reply (NYSCEF Doc. 635) on Motion Sequence 021, solely to the extent that the court considers Defendants BMW of North America, LLC's and BMW of North America, Inc.'s reply papers, and

(3) upon reconsideration, the court adheres to its prior Decision and Order and denies BMW's motion under Motion Sequence 021 in its entirety; and it is further

ORDERED that the court has considered any remaining arguments of the parties and denies any additional relief requested not specifically set forth herein; and it is further

ORDERED that this is the Decision and Order of the Court.

3/25/2021

DATE


ERIKA M. EDWARDS, J.S.C.

**HON. ERIKA M. EDWARDS
J.S.C.**

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART (renew)

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE